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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1465

JACK PACHECO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Jack Pacheco respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on February 25, 1977.

Opinion Below

The opinion of the Court of Appeals for the Fifth Circuit has not yet been published in the official reports. A copy of the opinion is attached hereto as Appendix A. (App. 8)

Jurisdiction

The jurisdiction sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on February 25, 1977. A Petition for Rehearing was filed which was subsequently denied by the Court on March 23, 1977.

Jurisdiction is conferred upon this Court by 28 U.S.C. 1254(1) to review the judgment of the Court of Appeals by writ of certiorari.

Questions Presented for Review

1. Whether or not the protections afforded citizens by the Fourth Amendment to the Constitution of the United States and the "exclusionary rule" against the wrongful acts of governmentally employed police, should be extended and applied as well to the wrongful acts of privately employed police?

2. Whether or not probable cause existed for the detention and arrest of the petitioner?

Constitutional Provision and Statute Involved

The Fourth Amendment to the Constitution of the United States is involved. The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

18 U.S.C. 472 is involved. The text of this section is attached hereto as Appendix B (App. 14)

Statement of the Case

The petitioner was charged and convicted with others of passing counterfeit currency in violation of 18 U.S.C. 472. The alleged violation took place at Disney World, a rather large, self-contained, privately owned amusement and recreation park. The petitioner was stopped by the Disney World police after having been seen by them in the company of an individual suspected of passing counterfeit money at the Park.

Upon stopping the petitioner and his party, the Disney police officer showed them a gold badge, told them that he wanted to talk to them, that they should not run, and that they should accompany him to the Disney Security Office. (App. 9). At the Security Office a guide book in the possession of the petitioner was examined by the officers and found to contain counterfeit bills. A search of the petitioner's pockets yielded incriminating evidence such as airline tickets in an assumed name; keys to a hotel room which proved to contain additional counterfeit bills, and packets of money which appeared to be change from large denomination counterfeit bills. (App. 9) The Court of Appeals assumed that the custody of the petitioner was such that he would have been forcibly detained had he attempted to leave. (App. 10) The petitioner was then placed by the security personnel in front of a one-way mirror where he was identified by Disney sales personnel as one of the individuals who had passed the counterfeit bills to them. (App. 10)

Only after this identification process had taken place did governmental agents of the Secret Service arrive and make a formal arrest.

Reasons for Granting the Writ

A. Private Security Forces Have Increasingly Taken on the Attributes of Public Police Forces and Should Likewise Be Held to the Same Standards of Conduct.

In 1921 this Court answered the question as to whether the Fourth Amendment to the United States Constitution applies to other than governmental agencies in the negative. This Court stated in its majority opinion that:

> "The Fourth Amendment gives protection against unlawful searches and seizures, and, as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies." *Burdeau* v. *McDowell,* 256 U.S. 465, 477

In recent years quasi-police forces, such as the one at Disney World, have come into existence. The record in this case indicates that Disney World employed a security force patrolling a large geographical area and having many of the powers and responsibilities of a typical police force.

Comparisons between Disney Police and regular police show many similarities. Disney agents are equipped with sophisticated mobile radio equipment for quick communication between agents and police officers whenever the need arises. Disney agents identify themselves by means of police-like badges. They have separate austere interview rooms in their headquarters. An additional room is equipped with a one-way mirror for use in identifications and showups. One of the Disney personnel involved in the petitioner's detention had lengthy previous experience

with a municipal police force, with the Federal Aviation Police and was educated at the Military Police School at Camp Gordon and the Washington, D.C. Police School. The hierarchy of Disney World security agents includes at least twenty-five supervisors. Within the Security Department there is apparently also an internal security force separate and distinct from the normal security force.

Walt Disney World agents have powers which resemble those of municipal police officers. They interrogate suspects and commence investigations of suspected criminal offenses. They consider themselves to have the power to engage in fairly sophisticated identification procedures, specifically, conducting showups before witnesses in a permanent room constructed for that purpose. Apparently, Disney agents also feel they have the authority to forcefully detain those they suspect of criminal activity. Detailed reports are made of the results of their investigations. Although there are occasions when a member of the Orange County Sheriff's Office is present on the grounds, Disney agents continually insist that only rarely is recourse taken to these police officers, that the job was mainly handled by themselves as far as initial investigation, detention, interrogation and identification procedures.

When all these factors are considered, it is evident that aside from some minor distinctions, the Disney World security force is a police force having most of the powers and duties of a police agency in any typical municipality. Within the Disney complex the Disney World security force is the "government" and has the "sovereign authority" for insuring the protection and safety of those who visit the amusement park, hotels and camping facilities which abound both within and on the periphery of the Park grounds.

Petitioner concedes that there is little legal precedent for the argument that a private security force should be held to the mandates of the Fourth Amendment when it

acts in a police capacity. However, private police should not be permitted to shield themselves from the mandates of the Constitution and to act in a manner antagonistic to its spirit by merely hiding behind the holding in *Burdeau, supra.*

The premise that private police should be held as accountable for their acts as public police is especially compelling when the government utilizes the wrongfully obtained evidence as the basis for obtaining a conviction. It is not difficult to imagine that this practice would easily lend itself to abuse.

This analysis should be considered in conjunction with the rationale of the exclusionary rule as it developed through its ultimate extension in *Mapp* v. *Ohio,* 367 U.S. 643 (1961). The foundation of the rule is simply that there is no other effective way of curtailing official misconduct in the seeking out and investigation of criminal activity unless the fruits of that official misconduct are excluded in any criminal procedures brought against the suspect. Hopefully, the police will alter investigatory practices to comport with constitutional mandates to avoid the exclusion of evidence. The argument that there is no need for a deterrent effect on the private individual since his motives are different from those of the police's and that he is normally not involved in criminal investigation on a recurring basis is not applicable here. The present case is far from the typical occasional private involvement in the investigation of a criminal offense. Here we have a security force which patrols a large geographical area and exercises most of the powers and responsibilities of a typical police force on a regular and continuous basis.

If private police officers are not held to the same constitutional standards as public police officers in the carrying out of police functions, the logical conclusion is that citizens unknowingly and tacitly leave their constitutional rights at the gate to Disney World.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted to determine whether or not private security forces which possess most of the attributes f public police forces can be held accountable for acts which violate the Fourth Amendment to the Constitution of the United States.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the Fifth Circuit

No. 76-1886.

UNITED STATES of America,
PLAINTIFF-APPELLEE,

v.

Thomas E. FRANCOEUR, Robert R. Pizio and Jack Pacheco,
DEFENDANTS-APPELLANTS.

Feb. 25, 1977.

Appeals from the United States District Court for the Middle District of Florida.

Before TUTTLE, CLARK and RONEY, Circuit Judges.

TUTTLE, *Circuit Judge*:

This appeal of the three appellants, each on several counts of an indictment charging them with having passed counterfeit $50 bills at Disney World in Florida, and having conspired to do so, raises principally the question whether the conduct of the security personnel of the privately-operated amusement park is to be equated with, and to be given the same effect as, actions by Government officials in the application of Fourth Amendment protection.

There is no issue on this appeal as to the sufficiency of the evidence for the conviction of the three defendants. The grounds of the appeal relate to the appellants' claim that they were detained, questioned, and viewed for identification purposes in a manner which, if carried on by either state or federal officials, would have amounted to a violation of their Fourth Amendment rights.

Briefly stated, a Disney World employee alerted a Mr. Morgan to the fact that several $50 counterfeit bills had been cashed on the morning in question. Morgan promptly sought to notify various outlets for merchandise, separately run throughout the park. He personally saw a transaction in which Francoeur took an article from the China Shop at a time when he observed a $50 bill with the critical serial number lying on the counter in his immediate presence. Morgan followed Francoeur and observed him meet appellant Pacheco in what was known as the Artist's Alleyway. He followed the two on to the Main street where they made a couple of moves that increased Morgan's suspicions, turning and retracing their steps toward the alleyway. Morgan then stopped long enough to call a Mr. Schmidt, a Walt Disney World security officer, at about which time appellant Pizio joined Pacheco and Francoeur. Schmidt followed the defendants until they reached the Train Station. There, they were stopped by Schmidt who identified himself and showed his badge (the insignia of Walt Disney World, a design of a globe with Mickey Mouse ears on top). He told them to keep their hands out of their pockets; that he wanted to talk with them; that they should not run; and that they should follow him to the Disney Security Office. Without objection, Schmidt testified at the trial at about this time, Pacheco went through some motions which Schmidt "assumed" represented an effort by Pacheco to hand a folded Disney World guidebook to Pizio but that Pizio moved away "like he didn't want to have anything to do with it."

After the three defendants were moved to a room in the Disney Security Office, Schmidt examined the Disney guidebook obtained from Pacheco and found that between the pages were nine crisp $50 counterfeit bills all with the critical serial number. He asked the three men to empty their pockets, which they did. Among the articles turned over were three Eastern Airline tickets, carbon copies

dated the same day from Boston to Orlando, in the names of Kramer, Sullivan and Sousa, the names that the three men gave to the security officers when they were being questioned. Pacheco also gave up the key to Room No. 1220 in one of the hotels in the compound serving Disney World and the receipts for the payment for the room in the names of Sousa, Creamer and Sullivan. Pacheco also had nine packets of genuine currency, each packet containing bills folded just once and each containing less than $50. Without objection, Schmidt testified: "It was in nine little packets. It was all together like if you went in and got change for a larger bill and you kept all of that change in one pocket. The stacks weren't taken out in your tens or your twenties or whatever, and put together. It was just packets of money like change from a bill."

While in custody, which we may assume for the purpose of this issue, would have amounted to forcible detention if the defendants had sought to leave over the protest of the security officials, they were placed before a one-way mirror and groups of sales persons were permitted to look at each of them individually in an effort to identify any or all of them as persons who had passed $50 bills to such sales persons during the day. Some one or other of the sales persons identified each of the three defendants as having passed such a bill or more. Thereupon, the Secret Service officials took over and filed formal charges, and obtained a search warrant for the search of the hotel room. There, or in the security office, they found a key which fit a suitcase found in the hotel room, which contained some $48,000 in counterfeit $50 bills with the same serial number.

All of the activities through identification procedures were performed by Disney World security personnel and before special agents of the Secret Service arrived at the scene.

[1] The appellants do not contest the validity of the arrest or of the issuance of the search warrant except to the extent that they were the result of the actions of the Disney World security personnel which we may assume, for the purpose of this discussion, would have violated the defendants' constitutional rights if carried out by governmental officials.

As has been recognized since *Burdeau* v. *McDowell,* 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921) the Fourth Amendment gives protection only against unlawful governmental action. In that case, the Supreme Court said:

> "The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued." 256 U.S. at 475, 41 S.Ct. at 576.

In *United States* v. *Mekjian,* we said: "Where no official of the federal government has any connection with a wrongful seizure, or any knowledge of it until after the fact, the evidence is admissible. (Citations omitted)." 505 F.2d 1320 at 1327.

This same principle has been announced in *United States of America* v. *Lamar & Aaron* (5th Cir. 1977), 545 F.2d 488: "Thus, if a search is conducted by a private individual, for purely private reasons, it does not fall within the protective ambit of the Fourth Amendment, *United States* v. *Maxwell* (5th Cir. 1973), 484 F.2d 1350, 1352."

Recognizing this principle, appellants say that, nevertheless, the security personnel of Disney World in this case are in truth and in fact "government" officials. This they seek to do under some such principle as announced by the Supreme Court in *Marsh* v. *Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265. In *Marsh*, the Court held that even though the town in question was totally a company-owned town, the fact that it was wide open to public access, and contained all of the necessary adjuncts and amenities of an ordinary town, a person could not be denied the right guaranteed under the First Amendment of freedom of speech on the streets of the company town. Of course, the most obvious difference between the case and *Marsh* is that Disney World is not an open town fully accessible and available to all commerce. This private property is an amusement park to which admission is charged. Moreover, there is no showing that it has all of the facilities ordinarily identified with a community in which persons live and carry on their business. No one is permitted into the outer gates of Disney World except by consent of the owners.

If the owners of this amusement park impose in an illegal manner on their clientele, such imposition, if in violation of statutes forbidding trespass, assault, false arrest, or any other offense, would subject the owners to a civil suit on behalf of the injured person. Such illegal conduct would not, however, give them the protection of the Fourth Amendment and the exclusionary rule which has developed from it. The exclusionary rule, itself, was adopted by the courts because it was recognized that it was only by preventing the use of evidence illegally obtained by public officials that a curb could be put on over-zealous activities of such officials. The Supreme Court has in no instance indicated that it would apply the exclusionary rule to cases in which evidence has been obtained by private individuals in a manner not

countenanced if they were acting for state or federal government.

[2] We have considered the further objection that the trial court erred in not suppressing testimony of identification from the several witnesses because of what the appellants alleged to have been a suggestive presentation of photographs to the witnesses by the Secret Service agents. The trial court ruled on the evidence as to the method reached by which several witnesses were shown the nine photographs containing those of the three defendants was "not suggestive, much less impermissibly suggestive." We do not find that determination by the trial court clearly erroneous.

The judgments are AFFIRMED.

APPENDIX B

UNITED STATES CODE
TITLE 18

CRIMES AND CRIMINAL PROCEDURE

Chapter 25. *Counterfeiting and Forgery*

SECTION 472. ***Uttering counterfeit obligations or securities***

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

June 25, 1948, c. 645, 62 Stat. 705.